A **NOLOSE ALBERT RALESHOME**

v.

PP

B COURT OF APPEAL, PUTRAJAYA
AZAHAR MOHAMED JCA
ROHANA YUSUF JCA
ZAKARIA SAM JCA
[CRIMINAL APPEAL NO: W-05-29-01-2013 (LSO)]
C 8 JANUARY 2014

EVIDENCE: *Expert evidence - Chemist's analysis of substance - Contradictions between chemist report and oral evidence - Homogenisation of substance - Whether substance to be homogenised before or during*
D *analysis - Whether irreconcilable conflict in evidence rendered conviction unsafe*

EVIDENCE: *Expert evidence - Chemist report - Chemist report contradicted by chemist's own oral testimony - Whether evidence essential to prove subject matter of charge - Whether infirmities and poor quality*
E *of chemist's evidence fatal to prosecution's case*

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in 707.5g methamphetamine - Appeal against conviction and sentence - Material contradiction between chemist's oral evidence and*
F *chemist report - Whether infirmities and poor quality of chemist's evidence fatal to prosecution's case - Whether there was serious misdirection by trial court warranting appellate interference*

The appellant was charged and tried for trafficking in 707.5g of
G methamphetamine in contravention of s. 39B(1)(a) of the Dangerous Drugs Act 1952. The learned High Court Judge, at the conclusion of the trial, convicted the appellant on the charge and sentenced him to the mandatory death penalty. Hence, this appeal. The ground of appeal that was raised by the appellant was
H that the conviction was unsafe since the prosecution had failed to prove one of the essential ingredients of the charge *ie*, that the substance was methamphetamine weighing 707.5g. The appellant argued that the High Court Judge erred in not concluding the evidence of the chemist ('PW3') was not credible whereby, the
I substance sent to her for analysis had been homogenised into powder during analysis when, clearly, homogenisation had to be conducted on the substance before analysis. The appellant also

submitted that the oral evidence of PW3 was materially contradicted by her own chemist report and the learned High Court Judge had failed to take the material contradictions into account. Hence, the appellant argued that this was a serious non-direction amounting to a misdirection.

Held (allowing appeal; quashing and setting aside conviction and death sentence)
Per Azahar Mohamed JCA delivering the judgment of the court:

(1) One of the essential ingredients of the offence to be proven by the prosecution is that the substance in question was methamphetamine weighing in total 707.5g. In her oral evidence, PW3 stated that she had homogenised the substance before she carried out the analysis of the substance. The importance of homogenising the substances before analysis was also emphasised in the UN Guidelines. However, in her chemist report ('exh. P9'), in which she was bound to state the truth, it was stated that the substance was homogenised during the analysis. Therefore, the oral testimony of PW3 was materially contradicted by her own chemist report. (paras 13, 14, 16 & 17)

(2) Exhibit P9 was a document required by law to be in writing and PW3 must be presumed to have stated the truth in exh. P9. In this regards, the learned High Court Judge had failed to evaluate and scrutinise the evidence of PW3 on the light of the glaring and material contradiction. In view of the unsatisfactory feature, it was difficult to conclude with any degree of certainty that PW3 had homogenised the substance before analysis, as required by the UN Guidelines. (para 17)

(3) It is of utmost importance that when testifying in court as well as writing a report, chemists must be meticulous and precise in the use of words, particularly in a case that attracts the mandatory death penalty. In this case, PW3's evidence was essential to prove that the impugned subject matter was methamphetamine weighing in total 707.5g. The whole of the prosecution's case centred around PW3's evidence which formed the essential element of the charge. On account of the infirmities and poor quality of PW3's evidence, there was

doubt about her analysis which in turn was fatal to the prosecution's case. It had the effect of striking at the very essence of the prosecution's case. (para 18)

(4) The learned High Court Judge had seriously misdirected herself on the fact and law resulting in the finding without any factual basis and was not supported by PW3's evidence. The irreconcilable conflict in the evidence of PW3 rendered the conviction unsafe, warranting appellate interference. (paras 19, 20 & 21)

Bahasa Malaysia *Translation Of Headnotes*

Perayu dituduh dan dibicarakan bagi pengedaran 707.5g methamphetamine yang bertentangan dengan s. 39B(1)(a) Akta Dadah Berbahaya 1952. Yang arif Hakim Mahkamah Tinggi, di akhir perbicaraan, mensabitkan perayu atas pertuduhan tersebut dan menjatuhkan hukuman mati mandatori terhadapnya. Maka, rayuan ini. Alasan rayuan yang dibangkitkan oleh perayu adalah bahawa sabitannya tidak selamat memandangkan bahawa pihak pendakwaan telah gagal membuktikan salah satu intipati penting pertuduhan tersebut, iaitu, bahawa bahan tersebut adalah methamphetamine yang mempunyai berat sebanyak 707.5g. Perayu menghujahkan bahawa yang arif Hakim Mahkamah Tinggi telah terkhilaf apabila gagal memutuskan bahawa keterangan ahli kimia ('PW3') tidak boleh dipercayai di mana, bahan yang dihantar kepadanya untuk analisis telah dihomogenkan kepada serbuk semasa analisis apabila, jelas bahawa, bahan tersebut harus dihomogenkan sebelum analisis. Perayu juga menghujahkan bahawa keterangan lisan PW3 dicanggah secara material oleh laporan kimianya sendiri dan yang arif Hakim Mahkamah Tinggi telah gagal mempertimbangkan percanggahan material tersebut. Dengan itu, perayu menghujahkan bahawa ini merupakan ketidakarahan serius yang menjurus kepada salah arahan.

Diputuskan (membenarkan rayuan; membatalkan dan mengenepikan sabitan dan hukuman mati)
Oleh Azahar Mohamed HMR menyampaikan penghakiman mahkamah:

(1) Salah satu daripada unsur penting kesalahan yang perlu dibuktikan oleh pihak pendakwaan adalah bahawa bahan yang dipersoalkan adalah methamphetamine yang mempunyai berat sejumlah 707.5g. Dalam keterangan lisannya, PW3 menyatakan

bahawa dia telah menghomogenkan bahan tersebut sebelum menjalankan analisis bahan tersebut. Kepentingan homogen bahan sebelum analisis adalah juga ditekankan dalam Garis Panduan UN. Walau bagaimanapun, dalam laporan kimianya ('eks. P9'), di mana dia terikat untuk menyatakan yang benar, adalah dinyatakan bahawa bahan tersebut telah dihomogenkan semasa analisis. Oleh demikian, keterangan lisan PW3 bercanggah secara material dengan laporan kimianya sendiri.

(2) Ekshibit P9 adalah dokumen bertulis seperti dikehendaki oleh undang-undang dan PW3 mesti dianggap sebagai telah menyatakan perkara yang benar dalam eks. P9. Dalam hal ini, yang arif Hakim Mahkamah Tinggi telah gagal menilai dan meneliti keterangan PW3 berkaitan dengan percanggahan yang jelas dan material tersebut. Berdasarkan ciri yang tidak memuaskan ini, adalah sukar untuk memutuskan secara muktamad bahawa PW3 telah menghomogenkan bahan tersebut sebelum analisis, seperti yang diperlukan oleh Garis Panduan UN.

(3) Adalah penting apabila memberikan keterangan di mahkamah dan juga menulis laporan, ahli kimia perlu teliti dan tepat dalam penggunaan perkataan, khususnya dalam kes yang membawa hukuman mati mandatori. Dalam kes ini, keterangan PW3 adalah penting untuk membuktikan bahawa subjek perkara yang dipersoalkan adalah methamphetamine yang beratnya adalah 707.5g. Keseluruhan kes pihak pendakwaan berkisar tentang keterangan PW3 yang membentuk unsur penting pertuduhan. Berdasarkan kelemahan dan kualiti rendah pada keterangan PW3, wujud keraguan mengenai analisisnya yang menjejaskan kes pihak pendakwaan. Ia mempunyai kesan menjejaskan akar umbi kes pihak pendakwaan.

(4) Yang Arif Hakim Mahkamah Tinggi telah secara serius tersalah arah dari segi fakta dan undang-undang yang menjurus kepada penemuan tanpa apa-apa asas fakta dan tidak disokong oleh keterangan PW3. Konflik dalam keterangan PW3 yang tidak boleh diselaraskan mengakibatkan sabitan tidak selamat, yang mewajarkan campur tangan rayuan.

Case(s) referred to:
Lim Pah Soon v. PP [2013] 8 CLJ 800 CA ***(refd)***
PP v. Ang Soon Huat [1990] 1 LNS 103 HC ***(refd)***
PP v. Mok Kar Poh [2001] 5 CLJ 206 HC ***(refd)***
PP v. Ong Cheng Heong [1998] 4 CLJ 209 HC ***(refd)***
PP v. Sulaiman Mohamad Noor [1995] 1 LNS 325 HC ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 180(1), (4), 399(3)
Dangerous Drugs Act 1952, ss. 39B(1)(a), 39B(2)

For the appellant - Karpal Singh (Zaleha Al-Hayat with him); M/s Karpal Singh & Co
For the respondent - Munahyza Mustafa; DPP

[Appeal from High Court, Kuala Lumpur; Criminal Trial No: 45-21-2011]

Reported by S Barathi

JUDGMENT

Azahar Mohamed JCA:

[1] Nolose Albert Raleshome ("appellant"), a citizen of Lesotho was charged and tried for trafficking in 707.5g of methamphetamine before the Kuala Lumpur High Court, an offence in contravention of s. 39B(1)(a) of the Dangerous Drugs Act 1952 ("DDA"), and punishable with mandatory death penalty prescribed under s. 39B(2) of the DDA.

[2] The offence was said to have been committed on 30 December 2010 at about 12 noon at the parking space of Food Court 118, Jalan 9, Taman Len Seng, in the District of Cheras, Federal Territory of Kuala Lumpur.

[3] The learned High Court Judge, at the conclusion of the trial, convicted the appellant on the charge and sentenced him to the mandatory death penalty and against that conviction he had appealed to this court.

[4] We heard his appeal and after hearing oral arguments, we reserved judgment. We now give our judgment.

[5] Acting on information received, at about 11am on 30 December 2010, a team of police officers led by Inspector Samsul bin Musa ("PW7") headed towards Taman Connaught, Cheras. Earlier, PW7 had received information that a Gen 2 car bearing registration no. WMX 9669 ("the target car") was being used for drug trafficking activities at Taman Connaught. The police team arrived at the targeted area at about 11.30am. Not long after that, PW7 was informed by SM Nurazlee bin Ismail ("PW8") that he had seen the target car in front of the Alliance Bank. Then, PW7 approached the target car but had found it empty. After that PW7 directed his team to carry out surveillance at the vicinity of the target car.

[6] At about 12.15 noon, PW7 was informed that 'a male of African descent' (later identified as the appellant) was seen carrying a black bag and heading in the direction of PW7's vehicle, which was positioned 15 meters behind the target car. At that moment, PW7 saw the appellant pass by his vehicle. PW7 observed the appellant getting into the target car alone and carrying a black bag. The appellant then started the engine and the car moved forward. PW7 and his team swung into action, following the target car from the rear. The distance between the target car and PW7's vehicle was less than 10 meters. PW7 did not lose sight of the target car at any time. PW7 and his team tailed the target car to Taman Len Seng.

[7] On arrival at Taman Len Seng, the target car entered into the area of the vicinity of Taman Len Seng Food Court. There, PW7 intercepted it. The appellant stopped the target car and he attempted to flee. PW7 and his team followed in pursuit of the appellant. PW8 was not involved in the pursuit of the appellant and he was tasked with standing watch over the target car. The appellant was apprehended soon after. At that time, the appellant was not carrying anything.

[8] PW7 conducted a body search of the appellant at the place where he was apprehended and recovered the car key from the appellant's front trousers pocket. PW7 brought the appellant to the target car which he was driving earlier. PW7 used the car alarm and found it to be functioning. The target car was found to be locked. Using the car key, PW7 opened the door of the target car and recovered a black bag. After some conversation with the

A appellant, PW7 pierced the black bag and found in it a black package. PW7 then placed the package in its original place, zipped up the bag and brought the appellant and the bag to the police headquarters. At the police headquarters, a thorough examination was made of the target car but nothing incriminatory was found. B The appellant was brought to PW7's office. There, PW7 took out the black package from the bag, opened the package by using a pair of scissors and found in it substance suspected to be dangerous drugs.

C **[9]** The package was then sent to the Chemistry Department for chemical examination and analysis. The package was later confirmed by the chemist, Muzaiyanah binti Mohd Kaprawi ("PW4") to contain 707.5g of methamphetamine.

D **[10]** In the petition of appeal, the appellant attacked the judgment of the learned High Court on a number of grounds. What turned out to be of critical importance in the course of the arguments before this court is the ground that the conviction of the appellant is unsafe for the reason that the prosecution has E failed to prove one of the essential ingredient of the charge, namely that the substance was methamphetamine weighing 707.5g. This is the focus of our judgment. Mr Karpal Singh, learned counsel for the appellant argued that the learned High Court Judge erred in not concluding the evidence of PW3, the chemist F was not credible. This is because the substance sent to her for analysis had been homogenised into powder during analysis when, clearly, homogenisation had to be conducted on the substance before analysis. Learned counsel further argued that the oral evidence of PW3 is materially contradicted by her own chemist G report and that the learned High Court Judge has failed to take into account this material contradiction. He then argued that this is a serious non-direction which amounts to a misdirection.

[11] In resisting the appeal, Puan Munahyza bt Mustafa, the learned Deputy Public Prosecutor ("DPP") argued that PW3 is a H truthful and credible witness. Both during cross-examination as well as during re-examination, she had confirmed that homogenisation would have to be done before analysis. It was argued by the learned DPP that with regard to the identity and the weight of the offending substance, PW3 had testified that she I had thoroughly homogenised the substance before analysis.

Learned DPP then brought to our attention that PW3 had conducted qualitative tests to determine the type of drugs and with regard to the weight of the methamphetamine, PW3 proceeded with the quantitative tests and found out that it contained 707.5g of methamphetamine. According to the learned DPP, the learned High Court had accepted the evidence of PW3. She then argued that there was no plausible reason for this court to disturb the finding of the learned High Court Judge.

[12] On the facts of the present case, we find there is much force in Mr. Karpal Singh's argument. Now, in accordance with the provisions of s. 180(1) and (4) of the Criminal Procedure Code ("CPC"), it is the duty of trial court to undertake a maximum evaluation of the credibility and reliability of all the evidence adduced so as to determine whether each and essential ingredients of the offence has been established, in order to make a finding whether or not the prosecution has made out a *prima facie* case against the accused (see: *Lim Pah Soon v. PP* [2013] 8 CLJ 800; [2013] 6 MLJ 252). Credible evidence is evidence which has been filtered and which has gone through the process of evaluation. Any evidence which is not safe to be acted upon should be rejected (see: *PP v. Ong Cheng Heong* [1998] 4 CLJ 209 and *PP v. Mok Kar Poh* [2001] 5 CLJ 206).

[13] In the context of the present case, one of the essential ingredients of the offence which the prosecution must prove is that the substance in question is in fact methamphetamine weighing in total 707.5g. This then brings into focus the evidence of PW3. In this regard, the material part of the evidence of PW3 in examination-in-chief is as follows:

> Ujian – Saya telah menjadikan bahan kristal jernih ini sebagai serbuk yang homogenasi dan kemudian saya telah menjalankan 2 analisa iaitu:
>
> 1. Analisa kualitatif – terdiri daripada 2 ujian:
>
> a) Ujian warna mengunakan bahan uji marquis dan bahan uji simon. Ujian ini memberi warna oren dan biru. Ini menunjukkan bahawa terdapat jenis Methamphetamine dalam bahan yang diterima;
>
> b) Ujian menggunakan peralatan Bas Chromatography Mass Spectometry (GCMS). Hasil analysis ini saya mengesahkan bahawa bahan diterima mengandungi Methamphetamine.

A

2. Ujian kuantitatif untuk menentukan berat dadah Methamphetamine. Hasil daripada timbangan dan analisa, saya dapati bahawa bahan kristal Ini mengandungi 707.5 gram Methamphetamine.

Semua ujian ini disyorkan oleh United Nations.

B

The important point that come out of PW3's evidence in examination-in-chief, as highlighted above, is that she had homogenised the substance before she carried out the analysis of the substance in question.

C

[14] It is significant to note that in the course of giving evidence in her examination-in-chief, PW3 tendered the chemist report which she had prepared and signed. This document was marked as exh. P9. We will say more about exh. P9 later in this judgment. At this juncture, it is important for us to refer to the evidence of PW3, where under cross-examination she tendered the UN Guidelines which was marked as exh. Dl. In accordance with the UN Guidelines, under cross-examination PW3 emphasised the importance of homogenising the substance before analysis. This is made clear in the following excerpt of PW3's testimony:

D

E

Sebelum analisis, bahan perlu di homogen dulu. Bukan semasa.

Ya, menurut UN Guidelines, proses homogenisation tidak boleh dibuat semasa analisis.

F

Ya, apa yang dalam UN Guidelines adalah sedang untuk diikuti.

Sahkan dalam keterangan saya telah menghomogen bahan sebelum buat analisis.

Setuju, mesti sebelum dan tidak boleh semasa analisis.

G

[15] Again, in re-examination, PW3 reiterated that homogenisation must first be done before analysis. In the words of PW3 in re-examination:

H

Setelah buat timbangan kasar dan mendapat nilai kasar besar bahan, saya telah menjadikan bahan menjadi homogen sebelum buat analisis.

I

[16] Coming back now to exh. P9. It is to be noted that exhibit P9 is a report entitled "Laporan Di Bawah s. 399 Kanun Tatacara Jenayah". It must be borne in mind that according to s. 399(3) of the CPC, PW3 is bound to state the truth in exhibit P9. Therein lies the flaw of the evidence of PW3, wherein in exhibit P9 she truthfully states, with the necessary emphasis, as follows:

> Saya Muzaiyanah Mohd Kaprawi, Ahli Kimia dalam Perkhidmatan Kerajaan Malaysia dengan ini memperakui bahawa pada jam 1206 pada 18/0l/2011 telah diserahkan kepada saya oleh INSP MOHD TAHZIR BIN HUSAIN satu sampul surat bertanda "TH" dan bermeterai "POLIS Dl-RAJA MALAYSIA 422.
>
> Saya telah memeriksa sampul surat "TH" dan mendapati di dalamnya satu balutan kertas karbon diperkuat pita pelekat bertanda "TA" berisi satu kertas sampul diperkuat dengan pita pelekat bertanda "TB" mengandungi satu bungkusan plastik yang diperkuat pita pelekat bertanda "TC". Bungkusan plastik ini mengandungi 995.2 gram (berat bersih) bahan Kristal jernih. Setelah dianalisis saya mendapati bahan tersebut mengandungi 707.5 gram methamphetamine.
>
> **Bahan tersebut di atas telah dijadikan serbuk yang homogen semasa dianalisis.** Selepas itu bakinya dimasukkan ke dalam paket plastik berasingan (dibekalkan oleh saya) dan ditandakan dengan Nombor Makmal yang tersebut di atas.
>
> Methamphetamine adalah disenaraikan dalam Jadual Pertama Akta Dadah Berbahaya 1952.

[17] In our view, clearly, the oral evidence of PW3 is materially contradicted by her own chemist report, exh. P9. In her oral evidence, she said she had homogenised the substance before analysis, whereas in exh. P9, she stated that the substance was homogenised during analysis. Exhibit P9 is a document required by law to be in writing. More than that, as we have emphasised earlier, PW3 is bound to state the truth in exh. P9. That being the case, PW3 must be presumed to have stated the truth in exh. P9 that the impugned substance had been homogenised into powder during analysis. In this regard, the learned High Court judge had failed to evaluate and scrutinise the evidence of PW3 in the light of this glaring and material contradiction. We have carefully and anxiously considered the entirety of the evidence of

PW3 on this critical issue. In view of the unsatisfactory feature, it is difficult for this court to conclude with any degree of certainty that PW3 had homogenised the substance before analysis, as required by the UN Guidelines. PW3's evidence was not satisfactorily adduced in this case.

[18] In any drug trafficking case, the evidence of the chemist as an expert witness must be satisfactorily and adequately adduced to prove that the impugned drug is a "dangerous drug" as defined in the DDA. In this regard, it is of utmost importance that when testifying in court as well as writing report, chemist must be meticulous and precise in the use of words, particularly in a case that attracts the mandatory death penalty (see: *PP v. Ang Soon Huat* [1990] 1 LNS 103; [1991] 1 MLJ 1 and *PP v. Sulaiman bin Mohamad Noor* [1995] 1 LNS 325; [1996] 1 MLJ 196). This contradiction assumes greater importance as PW3's evidence is essential to prove that the impugned subject matter is methamphetamine weighing in total 707.5g. The whole prosecution case centred around the evidence of PW3 before the High Court pertaining to this essential element of the charge against the appellant. On account of the infirmities and poor quality of PW3's evidence, there is doubt about her analyses. This is fatal to the prosecution's case; it has the effect of striking at the very essence of the prosecution's case.

[19] Even more, the learned High Court Judge seriously misdirected herself on the fact and law when she arrived at the following finding:

> The court has also carefully considered the words 'before' ("sebelum") and 'during' (semasa"). In the context of the analysis of drugs, the court is of the view that the homogenization of the drugs at the start of the process of analysis, whether before or just after the colour tests, could still be viewed as being done 'during' or "semasa" analysis. This is because the analysis of drugs is a process. The Court is of the considered view that homogenization at the start of the process and before the chemical testing could also be termed as "semasa" analysis.

[20] We find the finding of the learned High Court Judge is without any factual basis and is not even supported by the evidence of PW3. There was no evidence placed before the learned High Court Judge to enable her to make such a finding.

[21] In our judgment, the irrefutable fact remains that PW3 had made a previous written statement, in which she was bound to state the truth, which was materially inconsistent with her evidence in court. On a given set of facts, the oral testimony of PW3 is irreconcilably in conflict with her own chemist report, which has the effect of rendering the conviction very unsafe, warranting appellate interference.

[22] This appeal is, therefore, allowed on this ground alone. In the light we take of this appeal, it is not necessary for us to deal with the other grounds raised by learned counsel. The appellant should have been discharged and acquitted by the learned High Court Judge without his defence being called on this ground alone.

[23] Accordingly, we unanimously quashed and set aside the conviction and the death sentence against the appellant. The appellant is acquitted and discharged.